FILED
SEP 7 1994
OFFICE OF THE CLERK

No. 94-274

In The

Supreme Court of the United States

October Term, 1994

DON KING, GENE MALCOM, JIMMY VAUGHN, BRIAN SUMMERS AND JERRY HILLHOUSE,

Petitioners,

v.

GAYE JACKSON AND BARBARA BOWENS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CHARLES A. GOWER,
Counsel of Record
Attorney at Law
Post Office Box 5509
Columbus, GA 31902
(706) 324-5685

HOUSER PUGH
Attorney at Law
Post Office Box 2807
Columbus, GA 31902
(706) 324-4234

WILLIAM B. HARDEGREE
HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD
Post Office Box 2707
Columbus, GA 31902
(706) 324-0201

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

39 pp

QUESTION PRESENTED

Petitioners presented the question as to "Whether employees of the State of Georgia, who are sued in federal court on state law claims for alleged acts of negligence while performing their duties as state employees, are immune from suit pursuant to the Eleventh Amendment of the United States Constitution, when state law provides said employees have no personal liability for such actions, when any judgment must be paid from the state treasury, and when the state has not waived its Eleventh Amendment immunity."

MISSTATEMENTS IN QUESTION PRESENTED

The Question Presented contains misstatements of law and fact in that the issue before the Court is whether individual employees of the Georgia Department of Transportation (GDOT) are entitled to Eleventh Amendment jurisdictional immunity when they are sued in their individual capacity but the judgment will be paid from the State voluntarily established Liability Insurance Trust Fund rather than by private insurance.

The misstatements in Petitioners' Question Presented are: (1) That employees are immune from suit "when state law provides said employees have no personal liability". This is not correct because state law provides that the employees do have personal liability to the extent insurance is available; (2) that employees are immune from suit "when any judgment must be paid from the state treasury".

MISSTATEMENTS IN QUESTION PRESENTED – Continued

This is not correct in that any judgment will be paid from the Liability Insurance Trust Fund created pursuant to O.C.G.A. §45-9-1. This insurance was purchased by the GDOT to protect its employees. There is no way a marshal could execute the judgment against State Funds.

It is correct that the State of Georgia has not waived its Eleventh Amendment immunity. The State of Georgia has never been a party to the case and the GDOT was dismissed by the trial court without opposition from plaintiffs. The judgment is against five individual defendants. The jury returned a verdict in favor of six individual defendants and one was voluntarily dismissed by plaintiffs. These five individual defendants never had Eleventh Amendment immunity which could be waived by the State.

PARTIES

Petitioners Don King, Gene Malcolm, Jimmy Vaughn, Brian Summers, and Jerry Hillhouse are employees of the State of Georgia sued in their individual, not their official, capacities, and are residents of the State of Georgia.

Respondents Gaye Jackson and Barbara Bowens are residents of the State of Alabama.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MISSTATEMENTS IN QUESTION PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINION BELOW 1

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT AND CITATION OF AUTHORITY 5

ARGUMENT IN OPPOSITION TO PETITIONERS' REASONS FOR GRANTING THE WRIT 12

Response to Petitioners' Section I 12

Response to Petitioners' Section II 14

Response to Petitioners' Section III 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Barger v. State of Kansas, 620 F. Supp. 1432 (D.C. Kan. 1985) 9

Benning v. Board of Regents of Regency Universities, 928 F.2d 775 (7th Cir. 1991) 9, 10

Broome v. Percy, 470 F. Supp. 633 (E.D. Wis. 1979) 9

Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985) 9

Donald M. v. Matava, 668 F. Supp. 703 (D. Mass 1987) 9

Downing v. Williams, 624 F.2d 612 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (5th Cir. 1981) 11

Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), *cert. denied*, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d (1986) 9

Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986) 14

Griess v. State of Colorado, 841 F.2d 1042 (10th Cir. 1988) 9

Hafer v. Melo, ___ U.S. ___-___, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) 6

Hobbs v. Roberts, 999 F.2d 1526 (11th Cir. 1993) ... 6, 7, 13

Jackson v. Georgia Department of Transportation, 16 F.3d 1573 (11th Cir. 1994) 1

Kentucky v. Graham, 473 U.S. 158, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) 7

TABLE OF AUTHORITIES – Continued

Page

Litterilla v. Hospital Authority of Fulton County, et al., 262 Ga. 34, 413 S.E.2d 718 (1992)..... 7

Martin v. Georgia Department of Public Safety, 257 Ga. 300, 357 S.E.2d 569 (1987), *cert. denied*, 484 U.S. 998, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988)...7, 16

McAdoo v. Lane, 564 F. Supp. 1215 (N.D. Ill. 1983), aff'd. 774 F.2d 1168 (7th Cir.).....9, 11

Palmer v. Penn-Ohio Road Materials, Inc., 470 F. Supp. 1199 (W.D. Pa. 1979).....9, 11

Rochester Methodist Hospital v. Travelers Ins. Co., 728 F.2d 1006 (8th Cir. 1984)..... 9

Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981)..... 10

Rubacha v. Coler, 607 F. Supp. 477 (N.D. Ill. 1985).... 10

Schaefer v. Wilcock, 676 F. Supp. 1092 (D. Utah 1987).....9, 10

Scheuer v. Rhodes, 416 U.S. 232, 238, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)..... 6

Spruytte v. Walters, 753 F.2d 498 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 788, 88 L.Ed.2d 767 (1988)..... 9

Travelers Indemnity Company v. School Board of Dade County, Florida, 666 F.2d 505 (11th Cir. 1982), *cert. denied*, 549 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74..... 10

Welch v. State Department of Highways and Public Transportation, 483 U.S. 468 (1987)..... 13

TABLE OF AUTHORITIES – Continued

Page

Westinghouse Electric Corporation v. West Virginia Department of Highways, 845 F.2d 468 (4th Cir. 1988) 14

Wilson v. Beebe, 770 F.2d 578 (6th Cir. 1985) (*en banc*) 9

UNITED STATES CONSTITUTIONAL PROVISION:

Eleventh Amendment, United States Constitution 2, 13, 14

GEORGIA CONSTITUTIONAL PROVISION:

1983 Ga. Const. Art. I, Sec. II, Par. IX. 2

STATUTES AND REGULATIONS:

O.C.G.A. §45-9-1 ..... 2, 3

OTHER AUTHORITIES:

L. Tribe, *American Constitutional Law*, 132-33, note 22 (1978) 10

No. 94-274

In The

Supreme Court of the United States

October Term, 1994

DON KING, GENE MALCOM, JIMMY VAUGHN, BRIAN SUMMERS AND JERRY HILLHOUSE,

Petitioners,

v.

GAYE JACKSON AND BARBARA BOWENS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, GAYE JACKSON and BARBARA BOWENS, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners DON KING, GENE MALCOM, JIMMY VAUGHN, BRIAN SUMMERS and JERRY HILLHOUSE.

OPINION BELOW

The citation of the opinion in this case is *Jackson v. Georgia Department of Transportation*, 16 F.3d 1573 (11th

Cir. 1994). The opinion is reprinted in the Appendix to Petitioners' Petition for Writ of Certiorari at App. 1.

CONSTITUTIONAL PROVISION INVOLVED

(a) Eleventh Amendment, United States Constitution:

> The judicial power to the United States shall not be construed to extend to any suit in law or equity, commenced to prosecute against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

(b) Art. I. Sec. II, Par. IX, 1983 Georgia Constitution. (Petitioners' App. 31)

RESPONDENTS' STATEMENT OF THE CASE

Petitioners attempt to present their argument in the statement of the case. Respondents will reserve their argument but do want to point out in the procedural history of this case that the attorneys for the GDOT and the individual defendants filed their Motion to Dismiss the GDOT in May of 1991 on Eleventh Amendment jurisdictional immunity grounds, but did not file their motion to dismiss the individual defendants until the first day of trial March 23, 1992.

On page 3 of Petitioners' brief, it is a misstatement of fact that the Liability Insurance Trust Fund is funded by the State of Georgia. This is not correct. O.C.G.A.

§45-9-1(b)[1] authorizes agencies, boards, bureaus, commissions, departments or authorities to spend federal funds, state funds, or other available funds to purchase liability insurance or contracts of indemnity to protect their employees from liability claims. In this case, the GDOT paid from federal funds, state funds or other funds available to it, a premium of $841,679 to the Georgia Department of Administrative Services for a liability insurance policy governing the Petitioners. (See affidavit of James G. Newsome with three pages of the insurance policy attached as App. 1-9.) In addition, the GDOT had purchased an umbrella policy from a commercial insurance company, namely Lexington Insurance Company, to cover claims in excess of the coverage under the Liability Insurance Trust Fund.

The facts are clearly stated in Judge Black's majority opinion as follows:

> "Sometime between midnight and 3:00 a.m. on March 17, 1990, a road culvert in Stewart County, Georgia, washed out after the area received thirteen inches of rain in the previous twenty-four hours. The roadway sunk approximately three and one-half feet. Elijah Bowens and his passengers Jerry Franklin Jackson and Jerry Mark Jackson were killed when Bowens drove into the depressed section of roadway and hit the opposite bank.

---

[1] O.C.G.A. §45-9-1(b) "Such agencies, boards, bureaus, commissions, departments, or authorities may expend federal and state or other available funds for such purposes. The amount of such insurance or indemnity shall also be in the discretion of such agency, board, bureau, commission department or authority."

> "Gaye Jackson and Barbara Bowens, Alabama citizens, brought a tort action in federal court based on diversity jurisdiction against the Georgia Department of Transportation (GDOT) and numerous employees. The suit alleged negligent inspection of the culvert that collapsed and negligent review of the inspection reports. The district court dismissed the GDOT, finding it immune from suit under the Eleventh Amendment. After a five-day trial, the jury found Appellants Don King, Gene Malcom, Jimmy Vaughn, Brian Summers, and Jerry Hillhouse liable for negligence."[2]

The GDOT employees were sued in their individual capacities and not in their official capacities.

The Petitioners filed a motion to dismiss on Eleventh Amendment Immunity grounds. The gist of the motion was that since the GDOT had purchased insurance through the Liability Insurance Trust Fund rather than through a private commercial insurance company, the State of Georgia was the real party in interest, therefore, the Petitioners should also have Eleventh Amendment immunity protection. The trial judge denied the motion and the Eleventh Circuit affirmed the trial judge's denial of the motion.

---

[2] Defendant Senkbiel was voluntarily dismissed. The Jury returned a verdict in favor of Defendants Street, Melton, Thompson, Ethridge, Watson, and Childers."

SUMMARY OF THE ARGUMENT

1. Petitioners' statement that the judgments *must* be paid from state funds in not correct. The judgments will be paid from the Liability Insurance Trust Fund that was voluntarily purchased by the GDOT with federal funds, state funds, or other available funds for the protection of its employees.

2. Federal law controls federal jurisdiction questions under the Eleventh Amendment and not state law.

3. The matter argued is not worthy of consideration of this Court for two reasons: The Eleventh Circuit Court of Appeals decision was correct and the issue does not meet the criteria for granting the writ under Rule 10 in that (a) there is no division among the circuits on the issue; (b) the Eleventh Circuit decision is not in conflict with a decision of the U.S. Supreme Court; (c) the U.S. Supreme Court has decided on a number of occasions that state employees could be sued in their individual capacities in federal court; and (d) the issue argued is now moot under Georgia law except for a small number of pending cases.

ARGUMENT AND CITATION OF AUTHORITY FOR NOT GRANTING WRIT

On the first morning of the trial, Petitioners filed a motion to dismiss contending that the individual defendants should be dismissed from the case based on the contention that the court had no "jurisdiction over the subject matter" because of limitations placed on the court's jurisdiction under the Eleventh Amendment to the

United States Constitution. (See copy of the motion attached, App. 10 and 11.) The trial court denied the motion. The Eleventh Circuit Court of Appeals affirmed the trial court's denial of the motion. The affirming of the trial court's denial of the motion is the only issue before this Court. The statement of the issue in appellant's brief to the Eleventh Circuit Court of Appeals is as follows:

> "Whether the District Court erred in denying the motion to dismiss of the DOT employees on the ground that this action is barred as against them by the Eleventh Amendment to the United States Constitution."

In reviewing the issue, the only question is whether the GDOT's purchase of liability insurance through the State Liability Trust Fund (rather than through a commercial insurance company) makes the state the real party in interest resulting in an Eleventh Amendment immunity defense for the defendants who were sued in their individual capacity.

Every circuit that has considered the question has held that the existence of a voluntary liability trust fund does not make the state the real party in interest and does not extend the state's Eleventh Amendment immunity to its employees sued in their individual capacity. See footnote 7, Petitioners' App. 10 and 11; and *Hobbs v. Roberts*, 999 F.2d 1527 (11th Cir. 1993).

The United States Supreme Court has held in a number of cases that the Eleventh Amendment does not protect state employees sued in their individual capacity for employment related acts. *Hafer v. Melo*, ___ U.S. ___-___, 112 S.Ct. 358, 362-363, 116 L.Ed.2d 301 (1991); *Scheuer v. Rhodes*, 416 U.S. 232, 238, 94 S.Ct. 1683, 1687, 40

L.Ed.2d 90 (1974); and *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985).

The Georgia courts that have considered the status of the Liability Insurance Trust Fund have uniformly held that from a legal standpoint, there is absolutely no difference between the Liability Insurance Trust Fund and private commercial insurance.[3]

The trial court judgments are attached to Respondents' brief at App. 9-10. There is no way that a marshal could take an execution issued on these judgments and levy on the State of Georgia treasury to pay the judgment. As Judge Black stated in the majority opinion, (Petitioners' App. 1-11), "The voluntary nature of the state's liability insurance trust fund precludes finding that the damages award *must* be paid by the state in this action."

All members of the three judge panel of the Eleventh Circuit that heard *Hobbs* and all three members of the three judge panel that heard the case that is before this

---

[3] *Martin v. Georgia Department of Public Safety*, 257 Ga. 300, 357 S.E.2d 569 (1987); and *Litterilla v. Hospital Authority of Fulton County, et al.*, 262 Ga. 34, 413 S.E.2d 718 (1992). This issue arose regarding the question of whether creating a self insurance fund or self funded trust fund would waive state sovereign immunity defenses to the same extent as if the government department or agency had purchased private commercial insurance. The Georgia Supreme Court has consistently held that there is no distinction between a self insurance fund or trust fund for payment of claims and a commercial liability insurance policy. In *Litterilla* the Georgia Supreme Court held "[T]hat the Umbrella Liability Policy together with the trust fund created by the Hospital in 1978 constitutes 'liability insurance protection' within the meaning of the constitutional provision and therefore acts as a waiver of sovereign immunity."

Court agreed that the establishment of the Liability Insurance Trust Fund did not extend the Eleventh Amendment jurisdictional immunity defense to the individual defendants. Judge Roney in his dissent concurred with the majority on that issue.

In considering whether or not to grant the writ, Respondents do not feel that it is necessary to reargue the points made in the well reasoned majority opinion of Judge Black. Both the majority opinion and the concurring opinion of Judge Carnes clearly set forth the reasons that the trial judge was correct. Copies are attached to Petitioners' brief at App. 1-20.

From the affidavit attached to Respondents' brief, (App. 1-9), it is absolutely clear that the judgments will be paid from a reserve account under the Liability Insurance Trust Fund and not from the Treasury of the State of Georgia.

In addition, this Court should deny the writ because the Petitioners have misstated the facts when they say that the judgment in the instant case "must be paid from the state treasury". The judgment is against the Petitioners in their individual capacities and will be paid from the Liability Insurance Trust Fund.

Petitioners argue that any judgment paid from the Liability Insurance Trust Fund is an expenditure of state funds in violation of the Eleventh Amendment. This argument has been made and soundly rejected so often that making it now verges on spurious conduct. As said the 10th Circuit:

> "Several other circuits have already soundly rejected similar attempts to create a derivative

> constitutional immunity predicated upon . . . *Edelman* and a state indemnification obligation." *Griess v. State of Colorado*, 841 F.2d 1042, 1045 (10th Cir. 1988).

Likewise, the 7th Circuit held:

> "Along with the majority of jurisdictions, we thus hold that a state's decision to indemnify its employees does not transform a suit against individual defendants into a suit against the sovereign." *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775, 779 (7th Cir. 1991).

All circuit courts that have considered this issue have held the same as the 11th Circuit: *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985), *cert. denied*, 479 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986); *Spruytte v. Walters*, 753 F.2d 498, 511-14 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 788, 88 L.Ed.2d 767 (1988); *Wilson v. Beebe*, 770 F.2d 578, 587-88 (6th Cir. 1985) (*en banc*); *Demery v. Kupperman*, 735 F.2d 1139, 1146-48 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985); *Rochester Methodist Hospital v. Travelers Ins. Co.*, 728 F.2d 1006 (8th Cir. 1984); as well as numerous district courts: *Schaefer v. Wilcock*, 676 F. Supp.1092, 1100-1101 (D. Utah 1987); *Barger v. State of Kansas*, 620 F. Supp. 1432, 1438 (D.C. Kan. 1985); *McAdoo v. Lane*, 564 F. Supp. 1215, 1219-20 (N.D. Ill. 1983), aff'd. 774 F.2d 1168 (7th Cir.); *Broome v. Percy*, 470 F. Supp. 633, 635-36 (E.D. Wis. 1979); *Palmer v. Penn-Ohio Road Materials, Inc.*, 470 F. Supp. 1199, 1202 (W.D. Pa. 1979); *Donald M. v. Matava*, 668 F. Supp. 703, 706 (D. Mass 1987).

There are a number of reasons for this holding. First, Eleventh Amendment immunity applies only when a

judgment *must* be paid out of state funds. See *Travelers Indemnity Company v. School Board of Dade County, Florida,* 666 F.2d 505 (11th Cir. 1982), *cert. denied,* 549 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74 (1982) as cited in *Schaefer v. Wilcock,* 676 F. Supp. 1101. Secondly, the enactment of laws by state legislatures to indemnify or insure their employees are voluntary decisions made by the states. Any judgment rendered will bind the employees but will not *compel* the state to pay the judgment.

The state treasury is not impacted (at least for Eleventh Amendment purposes) if the state has voluntarily assumed the obligation to insure or indemnify. "[A] state should not be able to turn a purely intramural arrangement with its officers into an extension of sovereign immunity." L. Tribe, *American Constitutional Law,* 132-33, note 22 (1978), as quoted in *Rowin v. Shapiro,* 657 F.2d 1071 (9th Cir. 1981). "To hold otherwise would give the state carte blanche to provide a meaningless kind of paper protection – granting an 'indemnification' that would by its very existence, destroy the liability to which the indemnity purportedly extends." *Rubacha v. Coler,* 607 F. Supp. 477, 481, as quoted in *Benning,* supra at 779.

As Judge Ziegler, Western District, Pennsylvania, has succinctly said:

> "The reason is plain. The Eleventh Amendment was adopted to protect the states. It was not intended to bar suits or money judgments against public employees in their individual capacities. A public employee is liable for tortious conduct just as any other citizen absent some form of immunity *apart* from the Eleventh Amendment. (Emphasis added.)

> "(The Employee Liability Self-Insurance Program) represents an attempt by the Commonwealth to protect its employees *and also to insure that meritorious claims are paid.* It is incongruous for the Commonwealth employees to argue that the state, by creating a fund to compensate victims, has somehow extended immunity to them so as to deny payment to the class of intended beneficiaries." (Emphasis added.) *Palmer v. Penn-Ohio Road Materials, Inc., supra,* 470 F. Supp. at 1203.

This is the law in the Fifth Circuit. *Downing v. Williams,* 624 F.2d 612 (5th Cir. 1980). The 5th Circuit stated:

> " . . . the Eleventh Amendment clearly provides no immunity, despite the State's indemnity statute. Such an indemnity statute is only an agreement between the state and these individuals and cannot thereby be converted into an extension of Eleventh Amendment immunity by the state." *Downing v. Williams,* 624 F.2d 612, 626 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (5th Cir. 1981).

After reviewing the cases and rationale, one can certainly understand the statement made in 1983 that "Every [circuit] court to consider the effect of such indemnity statutes under the eleventh amendment has reached the same conclusion." *McAdoo v. Lane,* 564 F. Supp. 1215, 1219 (Ill. 1983), aff'd. 744 F.2d 1168. That conclusion is just as true today as it was then.

ARGUMENT IN OPPOSITION TO PETITIONERS' REASONS FOR GRANTING THE WRIT

I.

In response to Petitioners' argument for granting the writ, Section I, Petitioners have again misstated a fact to the Court. Petitioners continue to argue a point that is not true. The judgments will not be paid from the state treasury. Even if the judgments were paid from the state treasury, that is not the issue. The issue is whether the State of Georgia is compelled to pay the judgment. Obviously, the answer is no.

It is somewhat difficult to follow the Petitioners' points in their Reasons for Granting the Writ, Section I, but they appear as follows:

(a) The judgment will have to be paid from the state treasury. This is completely erroneous, as discussed above;

(b) State law must be considered in determining Eleventh Amendment immunity. This is wrong. See Judge Carnes' concurring opinion at Petitioners' brief, App. 12-20. Federal law determines federal jurisdiction questions, not state law;

(c) Petitioners cite a number of Georgia cases which have nothing whatsoever to do with the Eleventh Amendment immunity issue. All of these cases relate to state law questions such as venue, etc. Petitioners never made any argument before the trial judge regarding state sovereign immunity and state official immunity. The entire trial proceeded with plaintiffs, defendants, and the trial judge all agreeing that there was no issue of state

law sovereign immunity and official immunity as defenses because they were not available;

(d) In response to the argument of Petitioner that the Eleventh Circuit's opinion ignores precedent; to the contrary, Petitioners have cited *no* circuit court case or U.S. Supreme Court case that concludes that providing insurance or indemnity protection to its employees allows the employees to invoke the jurisdictional Eleventh Amendment immunity defense. The majority opinion of Judge Black, concurring opinion of Judge Carnes, and this brief cite ample precedent that the trial judge was correct in his ruling.

(e) In response to Petitioners' argument that the writ should be granted because there has been no ruling on the motion for rehearing in *Hobbs*, all of the six judges of the Eleventh Circuit Court of Appeals who have considered the issue raised in this petition have ruled with the trial judge on the issue before this Court and not one judge requested that there be a vote to determine whether there should be en banc consideration of the issue. (Petitioners' App. 30).

(f) The case cited by Petitioners, *Welch v. State Department of Highways and Public Transportation*, 483 U.S. 468, 474 (1987), is a correct statement of the law that the state does not waive Eleventh Amendment immunity when it waives sovereign immunity. However, in the case before the court, waiver was not an issue as the Petitioners never had Eleventh Amendment immunity to waive.

II.

In response to Petitioners' reasons for granting the writ in Section II, Petitioners contend that the decision in the case before the Court creates a conflict with a Fourth Circuit decision and conflict with a previous Eleventh Circuit decision. Both of the cases cited; *Westinghouse Electric Corporation-v. West Virginia Department of Highways,* 845 F.2d 468, 471 (4th Cir. 1988), and *Gamble v. Florida Department of Health and Rehabilitative Services,* 779 F.2d 1509 (11th Cir. 1986), are not authority for the issue before the Court. These cases involve a state highway department as a defendant in the West Virginia case and a state department of health as defendant in the Florida case. Respondents do not contend that the establishment of a liability insurance trust fund waives a state's or a state department's Eleventh Amendment immunity. In the case before this Court, the defendants are not states or state departments. As Judge Carnes stated in his concurring opinion, the purchase of liability insurance did not act as a waiver of Eleventh Amendment immunity because the individual defendants never had immunity to waive. See Petitioners' brief, App. 17, Footnote 2.

III.

In response to Section III of Petitioners reasons for granting the writ, Petitioners attempt to argue an issue of law that was not before the trial court or the Eleventh Circuit Court of appeals. Petitioners' motion to dismiss filed in the trial court is attached hereto at App. 10 and 11. The statement of the issue of law in Petitioners' brief filed with the Eleventh Circuit is set out on page 6 of this brief.

Appellate courts review rulings of trial courts for the purpose of correcting errors. Petitioners' argument in Section III was not before the trial court or the Eleventh Circuit Court of Appeals. Petitioners are attempting to bring an issue before this Court that was not ruled on in the trial court or by the Eleventh Circuit Court of Appeals. This issue should not even be considered in the Petition for Writ. This was apparently an afterthought just as filing the motion to dismiss on the first day of the trial was an afterthought. This idea apparently came from the dissenting opinion where the judge who wrote the dissent confused the issues of state sovereign immunity and state official immunity defenses with the Eleventh Amendment subject matter jurisdictional immunity defense.

To address Petitioners' argument on this point, the argument that some sort of new federal common law tort action has been created by the Eleventh Circuit in the case before the Court is totally untenable. The Petitioners have completely misstated the law of Georgia to this Court. The action for damages arising out of the incident on March 17, 1990, where Elijah Boots Bowens, Jerry Mark Jackson, and Jerry Franklin Jackson were killed could have been filed in a Georgia State court under the same substantive law as it was filed in the United States District Court for the Middle District of Georgia. In their brief, Petitioners state that the majority and concurring opinions cite no law to support the claims that Petitioners are individually liable for their tort. Petitioners cite no case or law where they are not held individually liable for their torts. Please see the majority opinion, Petitioners' brief App. 8 and 9, where several Georgia cases are cited

including *Martin v. Georgia Department of Public Safety*, 257 Ga. 300, 303, 357 S.E.2d 596, 572 (1987), *cert. denied*, 484 U.S. 998, 108 S.Ct. 685, 98 L.Ed.2d 638 (1988). The cases cited hold that these employees are individually liable to the extent there is insurance available to pay the judgment. There is sufficient insurance available to pay the judgments in this case from the Liability Insurance Trust Fund. It will not be necessary for the Lexington Insurance Company to contribute under the umbrella policy. In Petitioners' Section III, this defense was not asserted before the trial court, but even if it were, there is no merit to this defense whatsoever.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

The issues argued by Petitioners in their brief do not justify the granting of a writ under Rule 10.

(a) The decision by the Eleventh Circuit is not in conflict with other circuit decisions on the same issue. All of the circuits, including the Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, and the Tenth Circuit, which have ruled on the issue, have ruled the same as the Eleventh Circuit in the case before the Court. There is no division among the circuits.

(b) The decision is not in conflict with a decision of the United States Supreme Court.

(c) The decision is not a decision which has not been decided by the United States Supreme Court in that

this Court has decided on a number of occasions that state employees could be sued in their individual capacity in federal court.

(d) There was only a short period of time (1983-1991) when a tort action could be filed in Georgia against state employees under similar circumstances. (See Judge Carnes' opinion, Petitioners' brief, App. 19 and 20.) Therefore, this is a moot question in Georgia now except for any cases which may be pending from that time period. The matter presented is not worthy of consideration by this Court for two reasons: The Eleventh Circuit Court of Appeals decision was correct; and, the issue presented does not meet the criteria for granting the writ under Rule 10.

In addition to all of the legal argument, it is time for this case to be concluded. The plaintiffs, Mrs. Jackson and Mrs. Bowens, need to get on with their lives as best they can under the circumstances.

Respectfully Submitted,

CHARLES A. GOWER,
Counsel of Record
Attorney at Law
Post Office Box 5509
Columbus, GA 31902

HOUSER PUGH
Attorney at Law
Post Office Box 2807
Columbus, GA 31902

WILLIAM B. HARDEGREE
HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD
Post Office Box 2707
Columbus, GA 31902

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

GAYE JACKSON and BARBARA BOWENS, Plaintiffs,	*	CIVIL ACTION FILE NO. 90-124-COL
v.	*	
DON KING, GENE MALCOM, JOE STREET, BOBBY MELTON, EDWIN THOMPSON, VAN ETHRIDGE, DON WATSON, ALLAN CHILDERS, JIMMY VAUGHN, BRIAN SUMMERS, and JERRY HILLHOUSE, Defendants.	*	

AFFIDAVIT OF JAMES G. NEWSOM

COMES NOW JAMES G. NEWSOM, before an officer duly authorized to administer oaths in the State of Georgia, and states and deposes as follows:

1.

I am the Risk Management Director for the Department of Administrative Services of the State of Georgia. I administer the Liability Insurance Trust Fund, which Fund is responsible to pay claims made against insureds under the State of Georgia General Comprehensive Liability Insurance Policy.

2.

Brian Summers, Jimmy Vaughan, Gene Malcom, Jerry Hillhouse and Don King are insureds under the General Comprehensive Liability Insurance Policy, which policy is attached as Exhibit A. This policy has a liability limit of $5 million. This policy is funded by the State of Georgia. The State of Georgia has created a liability insurance trust fund for the payment of claims made against insureds under this policy. As of March 31, 1992, there was $63,750,041.00 in the Liability Insurance Trust Fund. The Department of Administrative Services has set aside reserves, as of March 31, 1992, in the amount of $17,398,831.00 for the payment of potential claims.

3.

With regard to the judgments that were rendered in the above-referenced case, the Department of Administrative Services has reserved in the Fund enough money to pay the judgments and any interest. The amount reserved is included in the $17,398,831.00 referred to in paragraph 2.

4.

The Department of Administrative Services intends to pay the judgments in this case should they not be reversed in the appellate courts. Actuarially, the Fund is sound and should be able to pay the judgments in the future.

5.

The State of Georgia has paid every valid claim made against the Liability Insurance Trust Fund.

6.

I have obtained quotes from insurance companies as to the cost of a bond to cover the judgments in this case. The most inexpensive quote that I received for a bond to cover these judgments is $13,050.00. The quote was received from the Reliance Insurance Company.

7.

I am competent to testify hereto.

/s/ James G. Newsom
JAMES G. NEWSOM

Sworn to and subscribed
before me this 6th day
of May, 1992.

/s/ [illegible]
NOTARY PUBLIC

My commission expires: 9-12-95

GEORGIA DEPARTMENT OF
ADMINISTRATIVE SERVICES
FISCAL DIVISION, RISK MANAGEMENT SERVICES
200 PIEDMONT AVENUE, S.E., SUITE 1504 W
POST OFFICE BOX 38198
ATLANTA, GEORGIA 30334

BROAD FORM STATE EMPLOYEE LIABILITY AGREEMENT

POLICY NO. CGL-401-14-90

Item 1: NAMED INSURED: EMPLOYEES, OFFICERS AND OFFICIALS OF THE DEPARTMENT: Department of Transportation

ADDRESS: 2 Capitol Square

Atlanta, Ga. 30334

Item 2: POLICY PERIOD: from 12:01 a.m. (EST.)
(time)

on July 01, 1989
(date)

to 11:59 p.m. (EST.) on June 30, 1990
(time) (date)

Item 3: Coverage A & C: PREMIUM FOR BLANKET COVERAGE GENERAL LIABILITY AGREEMENT

A. Premium Basis: (Budgeted Positions) 6956

B. Rate: Various

C. Premium: $841,676.00
(Premium Basis x Rate = Premium)

Item 4: Coverage B: PREMIUM FOR EMPLOYEE MEDICAL MALPRACTICE COVERAGE

*A. Premium Basis: Medical Speciality

B. Rate: Various

C. Premium: _____

* Department must provide an application for coverage giving names of medical personnel and medical specialty of each insured employee.

Item 5: LIMIT OF LIABILITY EACH OCCURRENCE: $5,000,000

AGGREGATE LIABILITY LIMIT: None

Item 6: DEDUCTIBLE: NONE

Item 7: Representative of NAMED INSURED for the filing or receipt of any notice provided for by the terms of the POLICY or for the receipt of return premium.

NAME Dick Wade
ADDRESS 2 Capitol Square
Atlanta, Ga. 30034
PHONE NO. 656-5229

Item 8: ENDORSEMENTS ATTACHED AT POLICY ISSUANCE: 1

DECLARATION PAGE

BROAD FORM STATE EMPLOYEE LIABILITY AGREEMENT

This is a contract issued by the Department of Administrative Services pursuant to the authority granted by O.C.G.A. Section 45-9-1 et seq. to provide insurance coverage to the following:

INSUREDS:

1) Employees of the State of Georgia employed by participating Departments or Agencies.

2) All employees of participating Authorities and Instrumentalities of the State of Georgia.

3) Board Members designated by participating entities.

4) Elected or appointed members of participating entities.

5) Members of the organized Militia who are serving on State active duty upon orders of the Governor.

6) Any person designated by law to be a State employee for insurance purposes.

7) Any participating entity as authorized by O.C.G.A. 45-9-1 now enacted or hereafter enacted.

8) All State employees as described in (1) and (2) above who are required by the Georgia Department of Labor to be reported on the Employer's Quarterly Tax and Wage Report (ESA-4), including the University of Georgia Extension Service Employees who are reported on the Employer's Quarterly

Tax and Wage Report (ESA-4) by the U.S. Department of Agriculture, only if the premium is paid for such coverage.

9) Any State paid student employee while in the employment of a State school, college or university, such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university or any other State paid employee whose salary is exempt from being reported on the Georgia Department of Labor Employer's Quarterly Tax and Wage Report.

10) Georgia Youth Conservation Corp members, leaders, and specialists in the Georgia Youth Conservation Corps within the Department of Natural Resources.

TERRITORY: This policy covers occurrences anywhere in the world.

RENEWAL: This coverage is to be renewed annually automatically, unless notice of intent not to renew is given by the participating entity, or notice of non-renewal is given to the participating entity by the Liability Trust Fund, hereinafter referred to as "The Fund." Premium notices will be directed unto each participating entity prior to the expiration date, or as near as possible to said date.

PART 1 – INSURING AGREEMENT

The insurance afforded by this policy applies only to occurrences or happenings or events on or after the above

stated Inception Date, and during the effective period of any renewal of this policy.

This policy covers the following: PERSONAL INJURY, BODILY INJURY, SICKNESS, DISEASE OR DEATH AND PROPERTY DAMAGE OR ECONOMIC LOSS caused by or resulting from error, omission or negligence in the performance of duties within the scope of an insured's employment with a participating entity that has purchased coverage prior to the date of occurrence.

In consideration of the payment of the appropriate premium, and subject to all of the limitations as set forth in this policy or any addendum hereto, the Department of Administrative Services agrees to provide insurance coverage and to make payments with respect thereto out of the reserve fund authorized by O.C.G.A. Section 45-9-4, which is commonly known as the Liability Trust Fund and which is hereinafter referred to as "the Fund," as follows:

A) COMPREHENSIVE GENERAL LIABILITY INSURANCE. The Fund will pay on behalf of any insured all sums which the insured shall become legally obligated to pay as damages, court costs, litigation expenses and attorney fees, because of bodily injury, property damage or personal injury resulting from any job related occurrences caused by any insured. The limitation on the Fund's liability under this section shall be as stated on the Declaration Page attached hereto and made a part of this policy; provided, however, where damages are incurred as a combination of bodily injury, property damage or personal injury, all such damages shall be combined in calculating the total liability of the Fund for any one occurrence caused by any insured and the total

limits of liability of the Fund shall not exceed the per occurrence limits of liability coverage as set forth in the declarations attached hereto.

B) OCCUPATIONAL ERRORS OR OMISSIONS LIABILITY INSURANCE. The Fund will pay on behalf of any insured all sums which the insured shall become legally obligated to pay as damages, court costs, litigation expenses and attorney fees, arising out of the performance of or failure to perform official duties in the insured's capacity as an officer or employee and caused by the insured. The Fund will also pay on behalf of the insured all such sums within the policy limits arising out of the rendering of or failure to render services by any person for whose acts or failure to act such insured is legally responsible by reason of the insured's position.

C) MEDICAL MALPRACTICE. The Fund will pay on behalf of any insured all sums which the insured shall become legally obligated to pay as damages, court costs, litigation expenses and attorney fees arising out of the performance of or failure to perform official duties in the insured's capacity as a medical practitioner in the employment of a participating State agency in consideration of the payment of the appropriate premium for each medical specialist and the premium is included in the total premium of Item 5 on the Declaration Page. The name of each insured medical specialist plus the insured's medical specialty must be provided to DOAS before coverage will be implemented.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

GAYE JACKSON and BARBARA BOWENS,	*	
Plaintiffs,	*	CIVIL ACTION
	*	FILE NO.
v.	*	90-124-COL
DON KING, GENE MALCOM, JOE STREET, DON SENKBEIL, BOBBY MELTON, EDWIN THOMPSON, VAN ETHRIDGE, DON WATSON, and ALLAN CHILDERS, JIMMY VAUGHN, BRIAN SUMMERS, and JERRY HILLHOUSE,	*	
Defendants.	*	

MOTION TO DISMISS

NOW COME Don King, Gene Malcom, Joe Street, Don Senkbeil, Bobby Melton, Edwin Thompson, Van Etheridge, Don Watson, Allen Childers, Jimmy Vaughn, Brian Summers, and Jerry Hillhouse Defendants in the above-styled action, and move this court to dismiss plaintiffs' claims against them on the grounds that, pursuant to Fed.R.Civ.P. 12(b)(1), this court lacks jurisdiction over the subject matter of plaintiffs' complaint because of the limitations placed on this court's jurisdiction by the Eleventh Amendment to the United States Constitution.

In support of this Motion, Defendants invite the court's attention to the attached Memorandum of Authorities.

WHEREFORE, Defendants King, Malcom, Street, Senkbeil, Melton, Thompson, Etheridge, Watson, Childers, Vaugh, Summers and Hillhouse pray that this Court grant their Motion to Dismiss and dismiss plaintiffs' complaint for lack of jurisdiction over the subject. matter.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ George P. Shingler
GEORGE P. SHINGLER
642850
Senior Assistant Attorney General

/s/ Erick A. Brewton
ERIC A. BREWTON 080417
Assistant Attorney General

/s/ Cathy A. Cox-Brakefield
CATHY A. COX-BRAKEFIELD 192292
Assistant Attorney General

PLEASE ADDRESS ALL COMMUNICATIONS TO:

ERIC A. BREWTON
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-3360

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA

GAYE JACKSON and BARBARA BOWENS

V.

DON KING, GENE MALCOM, JOE STREET, BOBBY MELTON, EDWIN THOMPSON, VAN ETHERIDGE, DON WATSON, ALLAN CHILDERS, JIMMY VAUGHN, BRIAN SUMMERS and JERRY HILLHOUSE

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-124-COL

(Filed Mar. 31, 1992)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Gaye Jackson, recover of the defendants, Don King, Gene Malcom, Jerry Hillhouse, Jimmy Vaughn and Brian Summers, the amount of $1,425,000.00, with interest thereon at the prevailing legal rate as provided by law, and her costs of this action.

March 31, 1992
Date

GREGORY J. LEONARD
Clerk

/s/ C.V. Palmer
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA

GAYE JACKSON and BARBARA BOWENS

V.

DON KING, GENE MALCOM, JOE STREET, BOBBY MELTON, EDWIN THOMPSON, VAN ETHERIDGE, DON WATSON, ALLAN CHILDERS, JIMMY VAUGHN, BRIAN SUMMERS and JERRY HILLHOUSE

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 90-124-COL

(Filed Mar. 31, 1992)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury as rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Plaintiff, Barbara Bowens, recover of the defendants, Don King, Gene Malcom, Jerry Hillhouse, Jimmy Vaughn and Brian Summers, the amount of $425,000.00, with interest thereon at the prevailing legal rate as provided by law, and her costs of this action.

March 31, 1992
Date

GREGORY J. LEONARD
Clerk

/s/ C.V. Palmer
(By) Deputy Clerk